1994

Mount Olympus Waters, Inc. v. Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MOUNT OLYMPUS WATERS, INC.,	)	
	)	
Petitioner - Appellant,	)	Case No. 940202-CA
	)	
vs.	)	
	)	Priority No. 15
UTAH STATE TAX COMMISSION,	)	
	)	
Respondent - Appellee.	)	

REPLY BRIEF OF PETITIONER - APPELLANT

On Appeal From The Order Of The
Utah State Tax Commission

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DETERMINATIVE STATUTE AND RULES

Utah Code Ann. §§ 59-12-104(15) (1993), 59-12-104(24) (1993)[1], Utah Admin. R. 865-19-85S and Utah Admin. R. 865-19-48S.

ARGUMENT

POINT I

THE COMMISSION MISCHARACTERIZED UTAH CODE ANN. § 59-12-104(15) AS A STANDARD OF REVIEW.

Page 2 of the Utah State Tax Commission's Brief (the Utah State Tax Commission will be referred to as the "Commission" and Mount Olympus Waters, Inc. will be referred to as "Mt. Olympus") the last sentence of the section entitled "Standard of Review" reads that Utah Code Ann. § 59-12-104(15) "specifically directs the Tax Commission to define terms used within that section by rule." Brief of Respondent -- Appellee, at 2. We simply note in passing that Utah Code Ann. § 59-12-104(15) as cited by the Commission has nothing to do with the "Standard of Review," and therefore, should not have been noted as a possible "Standard of Review."

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[1]The language in the statute at issue was added in 1987. In 1994, the Legislature amended the statute to eliminate the language at issue. See 1991 H.B. 279, a copy of which is attached hereto as Exhibit "1". The new legislation contains no provision for retroactive application and according to the Utah Constitution, the new legislation is effective sixty days after the Legislature adjourns. Utah Const. Art. VI § 25. Since the audit period at issue herein is January 1, 1988 through December 31, 1990, the new legislation does not apply to this appeal.

POINT II

UTAH ADMIN. R. 865-19-48S IS INVALID BECAUSE IT CONFLICTS WITH UTAH CODE ANN. § 59-12-104(24).

1. Utah Code Ann. § 59-12-104(24) is plain and unambiguous and the Court should not look beyond it to divine legislative intent.

In two recent cases, this Court considered the necessity of examining legislative intent with respect to the Commission's interpretation of two sales tax exemptions. In Miller Welding Supply, Inc. v. Utah State Tax Commission, 860 P.2d 361 (Utah App. 1993), Miller Welding developed an alternative method to deliver oxygen to medically dependent individuals. The method involved the use of a machine (concentrator) that concentrated oxygen from the surrounding air and delivered it to the patient. Miller Welding sold the oxygen concentrators to patients without collecting sales tax based on its interpretation of Utah Code Ann. § 59-12-104(10). Utah Code Ann. § 59-12-104(10) contains a sales tax exemption for "sales of medicine" and Utah Code Ann. § 59-12-102(4)(a)(i) defines medicine to include "any oxygen or stoma supplies prescribed by a physician." The Commission audited Miller Welding and disagreed with its interpretation and assessed sales tax on the sales of the concentrators. Miller Welding filed a petition for redetermination with the Commission and the Commission ruled that the exemption

does not apply. Even though the Court split on other issues, this Court agreed that:

> When statutory language is plain and unambiguous, we will not look beyond the language to determine legislative intent. (emphasis added).

Miller Welding, at 362.

The Court also agreed that:

> A statute is ambiguous if it can be understood by reasonably well-informed persons to have different meanings.

Miller Welding, at 362.

In OSI Industries, Inc. v. Utah State Tax Commission, 860 P.2d 381 (Utah App. 1993), this Court again considered the Commission's interpretation of a sales tax exemption. OSI operated a meat processing plant that produces ground meat patties for sale to McDonald's restaurants. In order to preserve the required quality, OSI sprayed liquid nitrogen on the patties. OSI purchased the liquid nitrogen from various vendors without paying sales tax based on its interpretation of Utah Code Ann. § 59-12-104(20). Utah Code Ann. § 59-12-104(20) contained a sales tax exemption for "sprays ... used to control ... diseases ... for commercial products or ... animal products." The Commission audited OSI and disagreed with OSI's interpretation and assessed sales tax on the purchases of liquid nitrogen. OSI filed a petition for redetermination with the Commission and the Commission ruled that

the liquid nitrogen purchased by OSI was not a "spray" and was not used to control "diseases" as contemplated by the statute. This Court reasserted its holding in Miller Welding and said:

> When statutory language is plain and unambiguous, we do not look beyond the same to divine legislative intent. (citations omitted)
>
> . . .
>
> Specifically, we will not interpret unambiguous language in a statute to contradict its plain meaning. (citations omitted)

OSI Industries, at 383 and 384.

One of the issues in this appeal is the meaning of the word "any" as used in the phrase "any container" that is found in Utah Code Ann. § 59-12-104(24). The word "any" standing alone is a plain and unambiguous word. A reasonably well informed person would not consider the word "any" to have different meanings. Furthermore, adding the word "any" to the statute (where previously the word was not part of the statute), makes the phrase "any container" even clearer. When considering these two factors, a reasonably well-informed person would not consider the phrase "any container" to have different meanings. Therefore, this Court should not look beyond the statute to divine legislative intent and should hold that Utah Admin. R. 865-19-48S is invalid because it conflicts with Utah Code Ann. § 59-12-104(24).

2. Even if the Court examines legislative intent, the legislative intent is not clear.

Even if the Court examines legislative history to determine legislative intent, the legislative intent is not clear. The Commission relies on Dr. Brady for the proposition that the Legislature did not intend to change previous tax policies. Dr. Brady said that "it is my understanding that the tax law will be still read and interpreted the same after these tax bills are passed as they are now." Recording at Senate Proceeding, January 15, 1987. However, Dr. Brady did not understand the prior interpretation of the statute, as evidenced by his Committee's recommendation to add the word "any" to "container" in the legislative enactment. Adding the word "any" contradicts the reusable and non-reusable distinction of the Commission's rules. Obviously, Dr. Brady did not have a complete understanding of the reusable and non-reusable distinction, nor the prior interpretation of the statute. Dr. Brady was confused and he confused the legislature. Therefore, the legislative intent is not clear enough to support the Commission's position, and this Court should hold that Utah Admin. R. 865-19-48S is invalid.

3. Interpreting "any" using its plain meaning would not render the statute unreasonably confused or inoperable.

The Commission argues that a plain reading of the statute would render the statute unreasonably confused and inoperable. The Commission then invites the Court to imagine a visit to a retail store where the value of the contents of containers are taxed but not the container. To the contrary, Mt. Olympus suggests that this Court imagine the results if it sustains the Commission's ruling. Lawyers, judges, and businessmen would be required to divine legislative intent contrary to the plain, unambiguous language of the statute. Words would not mean what they say. The tax system (and the entire legal system) would become inoperable because it would be necessary to examine legislative intent even for the clearest of statutes. Interpreting "any," using its plain meaning, would not render the statute unreasonably confused or inoperable, but just the opposite. Therefore, this Court should hold that Utah Admin. R. 865-19-48S is invalid.

POINT III

THE COMMISSION MISINTERPRETED E.C. OLSEN CO. V. STATE TAX COMMISSION.

The Commission misinterpreted the Utah Supreme Court's analysis in E.C. Olsen v. State Tax Commission, 168 P.2d 324 (Utah 1946). The Commission cited and quoted E.C. Olsen for the proposition that the sales tax exemption for containers does not

apply to reusable containers.[2] The Commission, however, failed to recognize that the statute at issue in E.C. Olsen contained two exemptions. The first exemption was for personal property that "became an ingredient or component part of the finished products." Id. at 330. The second exemption was for the "container, labels or shipping cases of what was being manufactured." Id. at 330. The provision quoted by the Commission applies to the first exemption, not the second exemption. The Court specifically held that the car strips, picking boxes, pea canning trays and milk cases or boxes are not "containers or labels or shipping cases within the means of subdivision (f)." Id. at 330. The Court ruled on the "ingredient or component part" portion of the statute (not the container portion). However, the Commission quotes E.C. Olsen to support its argument regarding containers, and then concludes that the container exemption applies "only to containers which were sold to and consumed by the consumer." Brief of Respondent -- Appellee, at 12. Within the same paragraph of the language quoted by the Commission, the Court goes on to say:

---

[2]The sales tax applicable in E.C. Olsen contained an exemption for personal property "which enter[s] into and becomes an ingredient or component part of the tangible personal property or product which he manufactures, or compounds, or the container, label or shipping case thereof." Emergency Revenue Act of 1933 [Sales Tax], L. 1933, Ch. 63, effective March 21, 1933, § 80-15-2(f).

> The test is: Are the articles involved consumed by the processor as the last user? If they are so consumed, the tax must be paid thereon by the processor. On the other hand, if the articles enter into and become an ingredient or component part of what he manufactures, and are thus passed on to the final user or the articles are containers, labels, or shipping cases of what he manufactures, the processor does not pay the tax. (emphasis added).

Id. at 330.

The analysis in E.C. Olsen concerning whether a particular item of personal property was used "over and over again" is used to determine if the personal property became an ingredient or component part of the finished product. According to the Supreme Court, if the personal property was to be used "over and over again", it did not become an ingredient or component part of the finished product and, therefore, not entitled to the first part of the exemption. The Court's conclusion would apply to a shovel, plow, ski lift or any other item of personal property. The Commission is confused because the E.C. Olsen picking boxes, pea canning trays and milk cases or boxes were considered "containers" in the generic sense, but were not containers of what was being manufactured and, therefore, not entitled to the second part of the exemption. Accordingly, in the case at bar, unlike E.C. Olsen, the Mt. Olympus containers are the containers for what is manufactured.

Holding that Mt. Olympus is entitled to the container exemption is consistent with the holding of E.C. Olsen v. State Tax Commission.

POINT IV

RULING THAT PASTEURIZATION REQUIRES HEAT PLACES AN UNWARRANTED AND UNNECESSARY RESTRICTIVE DEFINITION ON THE MANUFACTURING EXEMPTION.

The Commission quoted Webster's Dictionary for the proposition that "pasteurization" requires heat. However, the Commission failed to read the alternative definition of pasteurization from the same source. Webster's New Collegiate Dictionary (1981) also defines pasteurization as the:

> 2: partial sterilization of perishable food products (as frost or fish) with radiation (as gamma rays).

Webster recognizes a hi-tech pasteurization process which does not require heat. The Commission failed to recognize the existence of such process. Ruling that pasteurization always requires heat makes unwarranted use of an unnecessary restrictive definition in a hi-tech world. Such an interpretation and zealous tax collection runs counter to the purpose of the underlying statute and leaves Utah years behind for the purpose of encouraging new applications of recognized manufacturing processes. Drawings (Exhibits A, B and C at the Commission hearing) that illustrate the hi-tech pasteurization process used by Mt. Olympus are attached hereto as Exhibit "2", "3" and "4".

POINT V

STATUTES SHOULD BE INTERPRETED WITH ENOUGH LATITUDE TO ACCOMPLISH THE INTENDED PURPOSE.

The Commission correctly states the general rule that exemptions are generally construed narrowly and then says, among other things, that the manufacturing exemption should be construed narrowly. However, the Commission failed to quote the entire rule which states that exemptions should be construed with enough latitude to accomplish the intended purpose. In OSI Industries, this Court stated:

> Lastly, we note that although exemptions from taxation are generally construed narrowly, they should, nonetheless, be construed with sufficient latitude to accomplish the intended purpose. (citations omitted).

OSI Industries, at 385.

Following that directive, in the present case the manufacturing exemption should be construed with enough latitude to include the purchases presently at issue because the very exemption was intended to encourage such tax exempt purchases.

CONCLUSION

Based on the foregoing, Mt. Olympus is entitled to the statutory sales tax exemptions provided in Utah Code Ann. §§ 59-12-104(24) and 59-12-104(15). Accordingly, the Commission's decision to the contrary should be reversed and all taxes paid by Mt.

Olympus in order to perfect this appeal should be refunded to Mt. Olympus with interest.

Respectfully submitted this 20 day of April 1994.

JARDINE, LINEBAUGH, BROWN & DUNN
A Professional Corporation

By: _____
Kent B Linebaugh
John N. Brems

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of April 1994, I caused copies of **REPLY BRIEF OF PETITIONER-APPELLANT** to be served by having the same hand delivered and left at the office of the following with a clerk or other person in charge thereof:

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JNB\P\069.8

EXHIBIT 1

SALES TAX - CONTAINER EXEMPTION

1994

GENERAL SESSION

Enrolled Copy

H. B. No. 279 By John L. Valentine

AN ACT RELATING TO REVENUE AND TAXATION; CLARIFYING THE SALES TAX EXEMPTION FOR CONTAINERS, LABELS, AND SHIPPING CASES.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

59-12-104, AS LAST AMENDED BY CHAPTERS 166 AND 296, LAWS OF UTAH 1993

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 59-12-104, Utah Code Annotated 1953, as last amended by Chapters 166 and 296, Laws of Utah 1993, is amended to read:

59-12-104. **Exemptions.**

The following sales and uses are exempt from the taxes imposed by this chapter:

(1) sales of aviation fuel, motor fuel, and special fuel subject to a Utah state excise tax under Title 59, Chapter 13, Motor and Special Fuel Tax Act;

(2) sales to the state, its institutions, and its political subdivisions;

(3) sales of food, beverage, and dairy products from vending machines in which the proceeds of each sale do not exceed $1 if the vendor or operator of the vending machine reports an amount equal to 120% of the cost of items as goods consumed;

(4) sales of food, beverage, dairy products, similar confections, and related services to commercial airline carriers for in-flight consumption;

(5) sales of parts and equipment installed in aircraft operated by common carriers in interstate or foreign commerce;

(6) sales of commercials, motion picture films, prerecorded audio program tapes or records, and prerecorded video tapes by a producer, distributor, or studio to a motion picture exhibitor, distributor, or commercial television or radio broadcaster;

(7) sales made through coin-operated laundry machines, coin-operated dry cleaning machines, or coin-operated car washes;

(8) sales made to or by religious or charitable institutions in the conduct of their regular religious or charitable functions and activities and, after July 1, 1993, if the requirements of Section 59-12-104.1 are fulfilled;

(9) sales of vehicles of a type required to be registered under the motor vehicle laws of this state which are made to bona fide nonresidents of this state and are not afterwards registered or used in this state except as necessary to transport them to the borders of this state;

(10) sales of medicine;

(11) sales or use of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127;

(12) sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state;

(13) sales of meals served by:

(a) public elementary and secondary schools;

(b) churches, charitable institutions, and institutions of higher education, if the meals are not available to the general public; and

(c) inpatient meals provided at medical or nursing facilities;

(14) isolated or occasional sales by persons not regularly engaged in business, except the sale of vehicles or vessels required to be titled or registered under the laws of this state;

(15) sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission) in any manufacturing facility in Utah. Manufacturing facility means an establishment described in SIC Codes 2000 to 3999 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget. For purposes of this subsection, the commission shall by rule define "new or expanding operations" and "establishment." By October 1, 1991, and every five years thereafter, the commission shall review this exemption and make recommendations to the Revenue and Taxation Interim Committee concerning whether the exemption should be continued, modified,

or repealed. In its report to the Revenue and Taxation Interim Committee, the tax commission review shall include at least:

(a) the cost of the exemption;

(b) the purpose and effectiveness of the exemption; and

(c) the benefits of the exemption to the state;

(16) sales of tooling, special tooling, support equipment, and special test equipment used or consumed exclusively in the performance of any aerospace or electronics industry contract with the United States government or any subcontract under that contract, but only if, under the terms of that contract or subcontract, title to the tooling and equipment is vested in the United States government as evidenced by a government identification tag placed on the tooling and equipment or by listing on a government-approved property record if a tag is impractical;

(17) intrastate movements of freight and express or street railway fares;

(18) sales of newspapers or newspaper subscriptions;

(19) tangible personal property, other than money, traded in as full or part payment of the purchase price, except that for purposes of calculating sales or use tax upon vehicles not sold by a vehicle dealer, trade-ins are limited to other vehicles only, and the tax is based upon the then existing fair market value of the vehicle being sold and the vehicle being traded in, as determined by the commission;

(20) sprays and insecticides used to control insects, diseases, and weeds for commercial production of fruits, vegetables, feeds, seeds, and animal products;

(21) sales of tangible personal property used or consumed primarily and directly in farming operations, including sales of irrigation equipment and supplies used for agricultural production purposes, whether or not they become part of real estate and whether or not installed by farmer, contractor, or subcontractor, but not sales of:

(a) machinery, equipment, materials, and supplies used in a manner that is incidental to farming, such as hand tools with a unit purchase price not in excess of $100, and maintenance and janitorial equipment and supplies;

(b) tangible personal property used in any activities other than farming, such as office equipment and supplies, equipment and supplies used in sales or distribution of farm products, in research, or in transportation; or

(c) any vehicle required to be registered by the laws of this state, without regard to the use to which the vehicle is put;

(22) seasonal sales of crops, seedling plants, or garden, farm, or other agricultural produce if sold by the producer;

(23) purchases of food made with food stamps;

(24) [~~any--container;--label;-shipping-case;-or;-in-the-case-of-meat or--meat--products;--any--casing~~] sales of nonreturnable containers, nonreturnable labels, nonreturnable bags, nonreturnable shipping cases, and nonreturnable casings to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property to be sold by that manufacturer, processor, wholesaler, or retailer;

(25) property stored in the state for resale;

(26) property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state, except property purchased for use in Utah by a nonresident living and working in Utah at the time of purchase;

(27) property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;

(28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

(29) any sale of a service described in Subsections 59-12-103 (1)(b), (c), and (d) to a person for use in compounding a service taxable under the subsections;

(30) purchases of food made under the WIC program of the United States Department of Agriculture;

(31) sales or leases made after July 1, 1987, and before June 30, 1996, of rolls, rollers, refractory brick, electric motors, and other replacement parts used in the furnaces, mills, and ovens of a steel mill described in SIC Code 3312 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget, but only if the steel mill was a nonproducing Utah facility purchased and reopened for the production of steel;

(32) sales of boats of a type required to be registered under Title 73, Chapter 18, State Boating Act, boat trailers, and outboard motors which are made to bona fide nonresidents of this state and are not thereafter registered or used in this state except as necessary to transport them to the borders of this state;

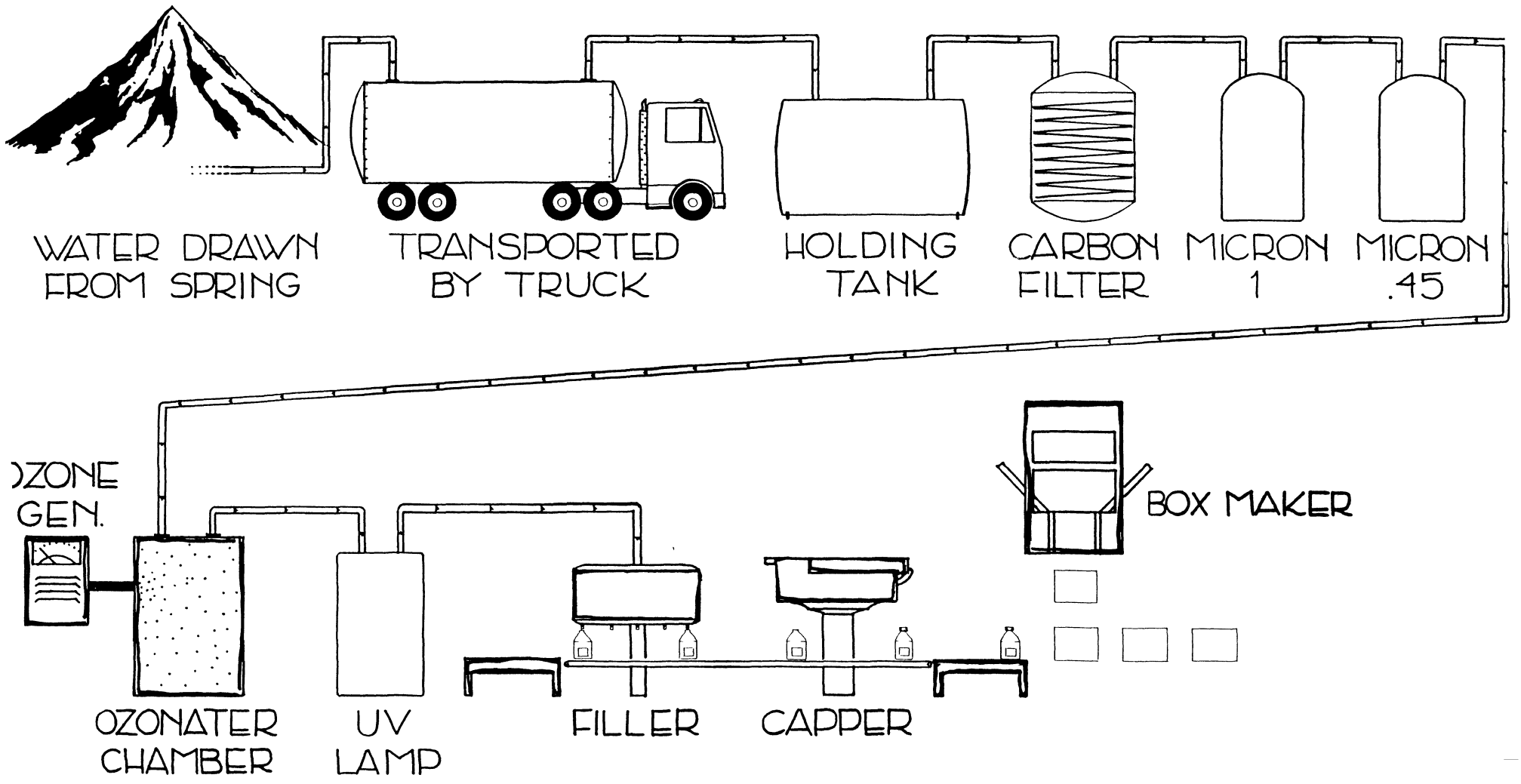
(33) sales of tangible personal property to persons within this state that is subsequently shipped outside the state and incorporated pursuant to contract into and becomes a part of real property located outside of this state, except to the extent that the other state or political entity imposes a sales, use, gross receipts, or other similar transaction excise tax on it against which the other state or political entity allows a credit for taxes imposed by this chapter;

(34) sales of aircraft manufactured in Utah if sold for delivery and use outside Utah where a sales or use tax is not imposed, even if the title is passed in Utah; and

(35) until July 1, 1999, amounts paid for purchase of telephone service for purposes of providing telephone service.

EXHIBIT 2

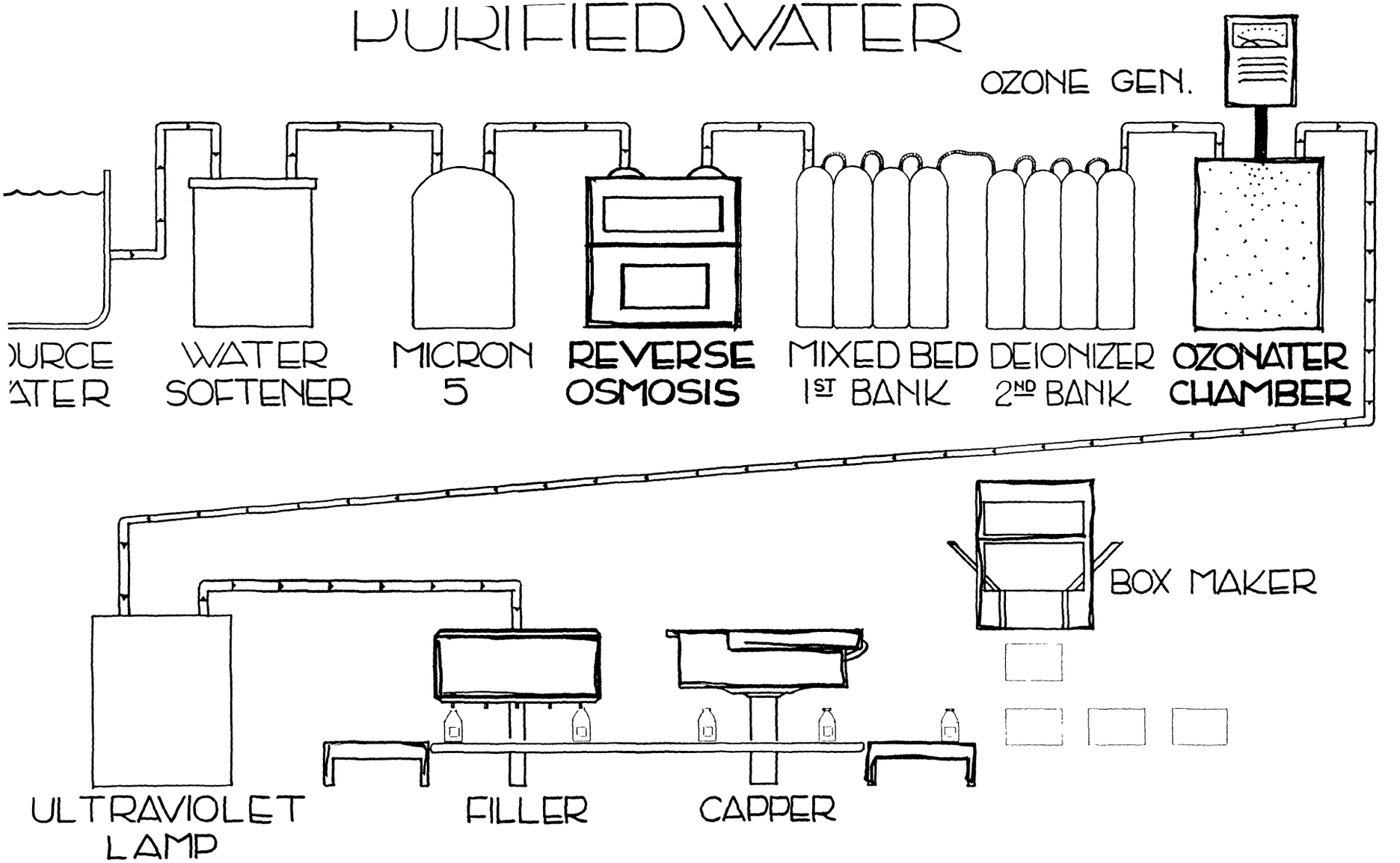
SPRING WATER



▬ = MANUFACTURING EQUIPMENT AT ISSUE

EXHIBIT 3

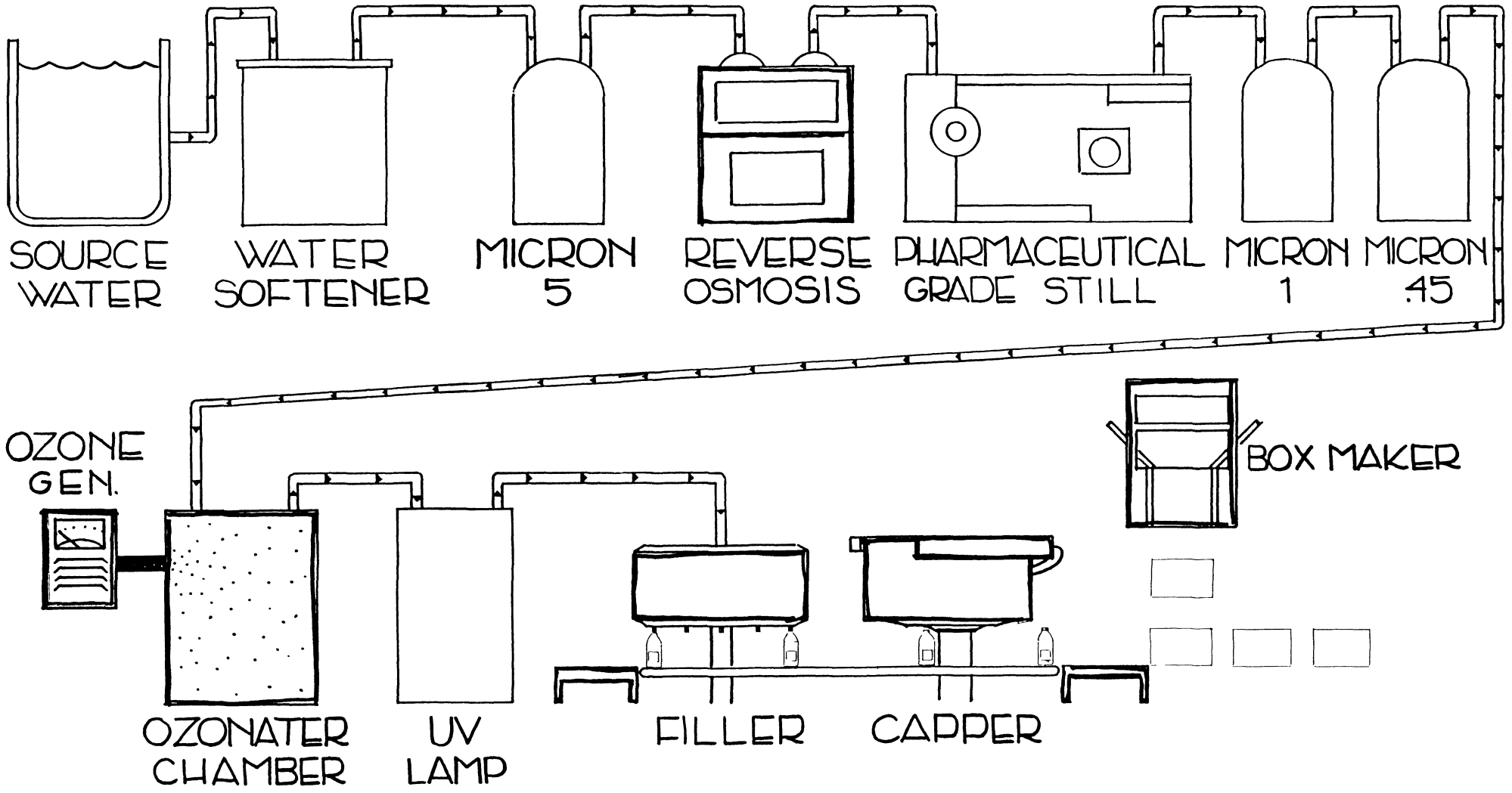
PURIFIED WATER



MANUFACTURING EQUIPMENT AT ISSUE

EXHIBIT 4

DISTILLED WATER



MANUFACTURING EQUIPMENT AT ISSUE